Filed 11/20/08 P. v. Thomas CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. SEAN THOMAS, Defendant and Appellant.	B200471 (Los Angeles County Super. Ct. No. BA281894)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant General, Lawrence M. Daniels and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

RELEVANT PROCEEDINGS

On May 3, 2006, an amended information was filed charging appellant Sean Thomas, as well as Wilbur Lawtron Lawson, and Dontae Ray Williams, with the murder of David Avila Rodriguez (Pen. Code, § 187, subd. (a)) and robbery (Pen. Code, § 211).[1] The information alleged that the murder had been committed during the robbery (§ 190.2, subd. (a)(17)). In addition, under both counts, the information alleged that a principal personally used a firearm (§ 12022, subd. (a)(1)), and that appellant had suffered two prior convictions within the scope of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).[2] Appellant, Lawson, and Williams pleaded not guilty and denied the special allegations.

Williams's trial was severed from that of appellant and Lawson, who were jointly tried. A jury found appellant guilty of first degree felony murder and second degree robbery, and found true the allegations with respect to both crimes that a principal had been armed with a firearm. Because the jury returned no verdict regarding the allegation that the murder occurred while he committed the

---

[1] All further statutory citations are to the Penal Code unless otherwise indicated. Lawson and Williams are not parties to this appeal.

[2] The amended information also alleged that appellant had served two prior prison terms (§ 667.5, subd. (b)). This allegation was later stricken. Regarding appellant's codefendants, the amended information alleged under both counts that Lawson personally fired or used a firearm (§ 12022.53, subds. (b) - (d)), that Williams personally used a firearm (§ 12022.53, subd. (b)), that a principal personally used a firearm (§ 12022, subd. (a)(1)), and that Williams was a minor of at least 16 years of age at the time of the crimes (Welf. & Inst. Code, § 707, subd. (d)(1)).

robbery, the trial court declared a mistrial as to that allegation.[3] During the bench trial on appellant's prior convictions, the trial court found that appellant had suffered a single prior "strike."[4] The trial court sentenced appellant to a term of imprisonment of 50 years to life plus one year as to the murder count, and to a four-year term as to the robbery count, which was stayed (§ 654). This appeal followed.

FACTS[5]

A. *Prosecution Evidence*

The key witnesses to the events connected with Rodriguez's murder were Brandin Brinkley, Heng Bou, Guadalupe Rivera, and Osman Alvarado, Rivera's brother. Brinkley testified as follows: At approximately 6:45 p.m. on February 24, 2005, he went to a 99¢ Store near Vermont and 61st Street. Outside the store, he encountered Lawson, who asked Brinkley where he could buy some gloves. Brinkley directed Lawson to the 99¢ Store. Brinkley later saw Lawson inside the store, and heard him say he wanted to buy two pairs of gloves. Lawson selected a

---

3 The jury also found Lawson guilty of first degree felony murder and second degree robbery, and found true the allegations that the murder had occurred while Lawson committed the robbery, and that a principal had been armed with a firearm. The jury in Williams's separate trial found him guilty of first degree felony murder and second degree robbery, and found true the allegation that a principal had been armed with a firearm.

4 At the prosecutor's request, the trial court dismissed the allegation that appellant had suffered a conviction constituting a second "strike."

5 In an unpublished opinion, this court resolved Lawson's and Williams's appeals following the judgments against them (*People v. Dontae Ray Williams et al.* (May 20, 2008, B198076)). As appellant was tried jointly with Lawson, our recitation of the pertinent facts in large measure tracks the facts stated in that opinion.

pair of black gloves and a pair of red and black gloves. Brinkley left the store and went home.

Bou testified that on February 24, 2005, he was working in a donut store at 60th Street and Vermont. Approximately 20 to 30 minutes before he heard sirens and saw an ambulance, two Black male youths entered the donut store and bought donuts. They sat in the store, ate the donuts, and left before Bou heard the sirens.

Rivera testified that at about 7:15 p.m. on February 24, 2005, she drove to pick up her brother, Alvarado, near a Dollar Warehouse located at Vermont and 60th Street. As she passed the Dollar Warehouse, she saw two men standing outside it, together with a third man wearing a mask. At least one man wore a hooded sweater. At the same time, she saw her brother, Alvarado, crossing the street. When Alvarado noticed her, he gestured that he was walking to the Dollar Warehouse. She parked, and saw the masked man -- who was the shortest of the three men outside the store -- follow Alvarado into the Dollar Warehouse. Inside the store, the masked man pointed a gun, while the other two men stood outside the store, watching him through a glass window.[6] When the two men began to enter the store, the masked man abruptly left the store, and Rivera heard gunshots. The three men ran away, and another man emerged from the store, holding his back and saying he had been shot.

Osman Alvarado testified that he went to the Dollar Warehouse to get something to drink. As he approached the store, he saw three African-American men standing outside. One of them wore a mask, and the others had sweater hoods over their heads. After Alvarado entered the store, he heard the masked man, accompanied by one of the other men, demand money, and heard a cashier

---

6 Rivera testified one of the two men looking through the window had a mask "halfway on."

respond, "Okay." The third man stood in the store's doorway as a lookout. When a struggle broke out involving the cashier, one of the robbers fired a gun, and Alvarado sought cover. After the robbers left, Alvarado saw money on the floor at the store's entrance. Alvarado was unsure whether the masked robber or his accomplices held the gun. He never saw the robbers' faces, and was unable to identify them.

Los Angeles Police Department (LAPD) officers who responded to the shooting discovered Avila Rodriguez wounded and lying on the ground. Rodriguez later died of a gunshot wound to his back. Investigating officers found a gun in front of the Dollar Warehouse, a pair of gloves approximately 200 feet from the Dollar Warehouse, and sales tags for gloves in the trash bin of the donut shop, which is approximately 80 feet from the Dollar Store. The gun belonged to Rodriguez's friend, and Rodriguez kept it in the store for his protection. The tags from the trash can displayed appellant's fingerprints, and closely resembled the tags of gloves sold in the 99¢ Store. In addition, appellant's DNA matched DNA on one of the gloves found near the Dollar Store.

Investigating officers also interviewed Brinkley, Bou, and Rivera, and obtained videotapes from the security systems in the 99¢ Store and the Dollar Warehouse, which were played for the jury. Brinkley selected Lawson in a photographic lineup as the person shopping for gloves in the 99¢ Store. According to LAPD Detective Erika Nuttman, Bou initially told investigating officers that three men had been in the donut shop before the shooting.[7] When Rivera was shown a photographic lineup, she identified Williams and appellant as the two men

---

[7] Bou testified that he did not recognize the two Black males when he was shown a photographic lineup by investigating officers. According to Diana Paul, a LAPD criminalist, Bou refused to examine the lineup when she showed it to him.

with visible faces outside the Dollar Warehouse.[8] The videotape from the 99¢ Store showed that Lawson bought two pairs of black gloves and one pair of red gloves, and the videotape from the Dollar Warehouse disclosed that the shooter wore red gloves, a hooded sweater, and something covering his face. The officers' investigations and other evidence at trial established that Lawson is several inches shorter than appellant and Williams.[9]

On April 14, 2005, LAPD Detective John Radtke interviewed appellant and Lawson.[10] According to Radtke, after he advised appellant of his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), appellant said he was in El Segundo on February 24, 2005, and denied any knowledge of the area surrounding the Dollar Warehouse. When Radtke told appellant that his DNA had been found on a glove discovered near the Dollar Warehouse, appellant said that he had intended to participate in the robbery and had gone to the donut shop. At the very last moment, he changed his mind, and stood across the street from the Dollar Warehouse while the robbery occurred. When he heard a gunshot, he ran away, and his glove fell off of his hand when he jumped over a bush.

Radtke further testified that Lawson, after being advised on his *Miranda* rights, said that on February 24, 2005, he lived at his grandmother's house at 6131

---

8 At trial, Rivera testified that she did not recognize appellant or Lawson as among the men she saw outside the store.

9 Williams tried to discard a firearm when he was arrested on March 6, 2005. LAPD criminalist Diana Paul testified that she was unable to determine whether the gun fired a bullet recovered from Rodriguez's body.

10 The trial court permitted Radtke to testify regarding appellant's and Lawson's statements during the interviews, in lieu of requiring the prosecutor to submit redacted video tapes or transcripts of the interviews to the jury. In so ruling, the trial court limited Radtke's testimony to appellant's and Lawson' statements about their own conduct, and instructed the jury that each defendant's statements could be considered solely as evidence against the defendant, and not his co-defendant.

Harvard.[11] Lawson initially stated that he did not recall visiting the 99¢ Store on the date of the robbery. When Radtke showed him photos from the store's security system, Lawson acknowledged that he bought gloves there, but stated that he went to the donut shop where he met Williams -- who is his cousin -- and then returned to his grandmother's house. Lawson asserted that he decided not to participate in the robbery because he did not want to get shot; he also denied that he gave red gloves to anyone else, and said he could not recall what he had done with the gloves he bought.

B. *Defense Evidence*

Appellant and Lawson presented no evidence at trial.

DISCUSSION

Appellant contends that the trial court erred in admitting evidence of his interview statements to Detective Radtke. Appellant does not dispute that Radtke advised him of his *Miranda* rights, which he impliedly waived by responding to Radtke's questions.[12] His sole contention is that Radtke improperly elicited his statements by implied offers of leniency and other misconduct. We disagree.

---

11 This address is within a half-mile of the Dollar Warehouse.

12 Generally, a waiver of *Miranda* rights may be implied from the defendant's conduct. "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." (*North Carolina v. Butler* (1979) 441 U.S. 369, 373.) Thus, a defendant may waive his or her rights simply by answering questions after hearing a recital of these rights. (*People v. Medina* (1995) 11 Cal.4th 694, 752.)

A. *Governing Principles*

"The Fourteenth Amendment to the federal Constitution and article I, section 15, of the state Constitution bar the prosecution from using a defendant's involuntary confession. [Citation.]" (*People v. Massie* (1998) 19 Cal.4th 550, 575-576 (*Massie*).) In *People v. Ray* (1996) 13 Cal.4th 313, 339-340, our Supreme Court explained: "In general, '"any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law.'" [Citations.] In identifying the circumstances under which this rule applies, we have made clear that investigating officers are not precluded from discussing any 'advantage' or other consequence that will 'naturally accrue' in the event the accused speaks truthfully about the crime. [Citation.] The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable. [Citations.]"

Under the federal and state Constitutions, the prosecution is obliged to establish that a defendant's statements were voluntary by a preponderance of the evidence. (*Massie*, *supra*, 19 Cal.4th at p. 576.) In making this determination, "courts apply a 'totality of circumstances' test to determine the voluntariness of a confession. [Citations.] Among the factors to be considered are '"the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."' [Citation.] On appeal, the trial court's findings as to the circumstances surrounding the confession are upheld if supported by substantial evidence, but the trial court's finding as to the voluntariness of the confession is subject to independent review. [Citations.]" (*Ibid.*)

B. *Underlying Proceedings*

During the trial, appellant sought to suppress evidence of his pre-trial statements to Detective Radtke. At the hearing on appellant's request, Radtke testified that he recorded his interview with appellant on April 14, 2005. Radtke stated that appellant did not appear to be under the influence of drugs or alcohol; moreover, Radtke denied that he made offers of leniency or threats to appellant. Also present during the interview was LAPD Detective Grace Garcia.

The recording of the interview was played for the trial court. Radtke began the interview by giving appellant *Miranda* warnings, and said, "I want to talk to you about why you're here." After noting that appellant had outstanding warrants for a probation violation and an offense in Oakland, Radtke questioned appellant about his upbringing in Compton and movements within California. Radtke then said: "I'm going to be real with you. Detective Garcia and I are investigating a robbery that occurred down here," and added, "[W]e got some information that you were involve[d] in that thing." Appellant denied that he had ever visited the area of the robbery, and asserted that he was in El Segundo when the robbery occurred.

When Radtke said that appellant's DNA had been found on a glove, the following exchange occurred:

"[Appellant]: . . . Basically why you all got me here?

"Detective Radtke: Because we're investigating this robbery. Okay.

"[Appellant]: Which is --

"Detective Radtke: The robbery that I'm talking about [occurred on] the same date that I'm talking to you about.

"[Appellant]: The donut shop?

"Detective Radtke: It was near a donut shop, yep. Okay."

Appellant stated that he knew about the robbery through "a person over there," and asked:

"[Appellant]: . . . [If] I give up the information will I get to go home so I can make it to my daughter's birthday?

"Detective Radtke: There's nothing I can do with your warrant right now. Okay.

"[Appellant]: So that's what you got me on[,] my warrant?

"Detective Radtke: But I want to figure out this robbery."

Appellant stated that two "homeboys," one of whom was Williams, robbed the store while appellant stood across the street. When he saw the two robbers running from the store, appellant fled, tripped over a bush, and dropped his glove; he also heard shooting. After Radtke said that he knew appellant did not do the shooting, the following exchange occurred:

"[Appellant]: Well, why you give me the run-around if you already know --

"Detective Radtke: Well, I know.

"[Appellant]: -- . . . it's my daughter's birthday. I'm trying to make something.

"Detective Radtke: [Sean,] hear me out. You know I didn't put you up in this. Okay. But I'm trying to get to the truth. That's it. [You need t]o be real with me because . . . I can't come at you and tell you everything that I know, because I got to make sure that you're telling me the truth."

The exchange continued:

"[Appellant]: Basically I am here for what?

"Detective Radtke: You are here for investigation of that robbery.

"[Appellant]: That's why I'm really here?

"Detective Radtke: Yeah, and you got the warrants. There ain't nothing I can do about those warrants. You got to deal with that . . . , you know, if it's a

matter of you just reporting. I don't know. That is up to the judge, you know what I'm saying?

"[Appellant]: I mean, what's your opinion on that though, because I'm trying to at least make it back home. At least give her some type of gift.

"Detective Radtke: Well --

"[Appellant]: Something.

"Detective Radtke: I got to know what happened. I got to know what happened.

"[Appellant]: So if I tell you something --

"Detective Radtke: All I got -- all I got is the outside story here.

"[Appellant]: Uh-huh. [¶] . . . [¶]

"Detective Radtke: And I'm after the truth, man. You got to tell me what happened.

"[Appellant]: Oh, I tell you on that."

Appellant stated that he met with Williams and Williams's cousin at a house owned by Williams's grandmother. The threesome went to a donut shop, which Williams's cousin left to get some gloves. Appellant again asserted that he stood across the street while Williams and his cousin conducted the robbery; in addition, he denied that he shared in the proceeds from the robbery. When Radtke revealed that he had a videorecording of the robbery, appellant acknowledged that he "changed [his] mind [at the] last moment," and did not enter the store. Appellant then identified photographs of Lawson and Williams as the robbers. At the end of the interview, after Radtke mentioned the warrants for appellant, the following exchange occurred:

"Detective Radtke: . . . You have any questions at all for me right now?

"[Appellant]: (Inaudible) get to go home?

"Detective Radtke: Well[,] I can't -- things are out of my control. Okay. I told you right from the get go, . . . you got all these serious warrants and stuff. We're just after the truth here. Okay."

Appellant also testified at the suppression hearing. According to appellant, prior to the recorded interview, he twice requested an attorney, but Detective Radtke ignored him. When he told Radtke that he wanted to go home for his daughter's birthday, Radtke promised that he would go home if he cooperated, and also promised him help with the outstanding warrants. Radtke also said that he could make "things difficult for [appellant] in custody" if he did not cooperate. Radtke then informed appellant what he wanted to hear during the interview. Appellant complied, and made the required statements. On cross-examination, appellant acknowledged familiarity with his *Miranda* rights due to his prior convictions, denied any involvement in the robbery, and stated that he could not recall selecting photographs of his codefendants. In rebuttal, the prosecutor presented additional testimony from Radtke, who denied that he made promises or threats to appellant, that he "fed" appellant facts about the robbery and shooting, and that appellant requested an attorney.

In declining to exclude appellant's statements, the trial court found that the statements were voluntary: "Detective Radtke's testimony was cohesive and believable and most important is supported by the recording itself. [Appellant's] testimony [was] not believable. The recording does contain a very clear statement of his *Miranda* rights. I think it's very important that this is a defendant who is not inexperienced in the criminal justice system. [¶] He's had two prior felony convictions and I can only conclude from that that what happened with regard to the *Miranda* warnings and so forth was not something that was a new experience; but clearly when they were explained to him in the recording, he did not disagree, he did not say anything which would support his version now. [¶] In addition, the

recording contradicts also [appellant's] testimony and [shows] that Radtke repeatedly said that he could not help with the warrants, that the warrants were out of his control and [appellant] has said that that was a key incentive. . . . [T]here are other reasons that I don't believe [appellant]. . . . [H]e said that he couldn't remember looking at any photos when there's a good deal of time spent doing that."

C. *Analysis*

The focus of our inquiry is on whether appellant's statements, as contained in the recorded interview, were voluntary. There is ample evidence to support the trial court's findings -- which appellant does not challenge -- that none of the unrecorded remarks and conduct appellant attributed to Detective Radtke and himself actually occurred. (*People v. Memro* (1995) 11 Cal.4th 786, 827 [trial court's assessment of credibility of police officers and defendant's witnesses at suppression hearing must be accepted on appeal, if supported by substantial evidence].) As explained below, Radtke's recorded remarks cannot be regarded as improper promises of leniency or any other form of coercion.

Appellant contends that Detective Radtke effectively promised appellant an early release by playing on his desire to attend his daughter's birthday, and failing to disabuse him of the hope of a release. The crux of appellant's argument is that Radtke, by declining to respond *directly* to appellant's references to his need to attend his daughter's birthday, raised the reasonable inference in appellant's mind that his cooperation would obtain his release. We disagree.

In *Massie, supra*, 19 Cal.4th at pages 574-577, the defendant, who had been arrested for murder, was interviewed by police officers, including Inspector Frank Falzon. After the officers gave *Miranda* advisements, the defendant said, "'I will talk to you only on one condition.'" (*Massie, supra*, 19 Cal.4th at p. 575.) The

defendant explained that people within the prison system were trying to kill him, and thus he wanted to be housed in a separate jail cell. (*Ibid*.) Falzon replied, "'I believe that can be accommodated for you sir.'" (*Ibid*.) When the defendant insisted on a guarantee, Falzon said that he and his colleagues did not run the jail, but that they would tell the sheriff that the defendant's life was in danger, and that they would "do everything within [their] power" to obtain a separate cell for the defendant. (*Ibid*.) Our Supreme Court, in concluding that the defendant's confession was voluntary, determined that Falzon's remarks did not constitute an improper promise, stating: "True, before he confessed, defendant asked Inspector Falzon to promise that he would be placed in a separate cell. But Falzon never made such an express promise; rather, he explained to defendant that he and Inspector Clark did not 'run the San Francisco City Jail,' but that they would try to have him placed in a separate cell. More importantly, Inspector Falzon never told defendant that any effort to secure defendant a separate cell would be *contingent* on defendant's decision to give a statement." (*Id*. at p. 576.)

Here, Detective Radtke told appellant that he was being held for outstanding warrants, and that Radtke's interview concerned a robbery. Although appellant repeatedly sought an assurance that he would be released in time to attend his daughter's birthday if he cooperated, Radtke offered no such assurance; instead, Radtke emphasized he had *no* control over the treatment of the warrants. Under these circumstances, the fact that Radtke never expressly stated that he could not -- or would not -- release appellant in time for the birthday does not constitute a promise of leniency: Radtke's remarks carry far less suggestion of any such promise than Inspector Falzon's remarks.

Appellant also contends that Detective Radtke's failure to tell him that he was investigating a murder amounted to coercion. As our Supreme Court explained in *People v. Farnam* (2002) 28 Cal.4th 107, 182, "'[l]ies told by the

police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary.' [Citations.] Where the deception is not of a type reasonably likely to procure an untrue statement, a finding of involuntariness is unwarranted. [Citation.]"

An instructive application of this standard is found in *People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280 (*Chutan*). There, the interrogating officers, who were investigating charges that the defendant had sexually molested his children, told the defendant only that they sought information related to the children's placement. In rejecting the defendant's contention that his incriminating statements resulted from coercion, the appellate court pointed to *Colorado v. Spring* (1987) 479 U.S. 564, 576, in which the United States Supreme Court held the failure of police officers to tell the defendant that they were investigating a murder did not vitiate the defendant's waiver of his *Miranda* rights. The court in *Chutan* reasoned: "If the failure to advise a suspect about the subject of an interrogation does not invalidate that suspect's waiver of rights under *Miranda*, then it is difficult to perceive how the failure to brief a suspect on the official plan for an interrogation can constitute coercion for purposes of the due process clause." (*Chutan, supra*, 72 Cal.App.4th at p. 1282.) In view of *Chutan*, Detective Radtke did not engage in coercive deception by failing to tell appellant that he was investigating a murder.

Appellant's reliance on *People v. Hogan* (1982) 31 Cal.3d 815, disapproved on another ground in *People v. Cooper* (1991) 53 Cal.3d 771, 836, is misplaced. In *Hogan*, officers investigating two homicides repeatedly interviewed the defendant, who initially denied his guilt. (31 Cal.3d at pp. 834-844.) They falsely stated that eyewitnesses had seen him commit the murders, asked him whether he had a mental problem, and offered him help. (*Id*. at pp. 835-841.) He became distraught, began to question his own sanity, and made incriminating admissions.

(*Ibid*.) The court in *Hogan* concluded that these admissions were not voluntary due to improper offers of leniency based on the defendant's purported mental problem. (*Hogan, supra,* 31 Cal.3d at p. 841.) In so concluding, the *Hogan* court noted that the officers' false statements about eyewitnesses had caused the defendant to doubt his sanity, and thus made their offer of leniency more compelling to the defendant. (*Hogan*, at pp. 840-841.)

The situation before us does not resemble the extraordinary circumstances presented in *Hogan*. Unlike *Hogan*, nothing suggests that Detective Radtke's failure to tell appellant that he was investigating a murder and failure to respond directly to appellant's references to his daughter's birthday caused appellant to question his sanity.

The other cases upon which appellant relies are also factually distinguishable. In some of these cases, the interrogating officers made express promises of leniency, or expressly misinformed the defendant about the legal consequences of his silence. (*People v. Vasila* (1995) 38 Cal.App.4th 865, 874 [officers made express promises that defendant's cooperation would insulate him from federal criminal proceedings and secure his early release]; *People v. Esqueda* (1993) 17 Cal.App.4th 1450, 1486 [officers told defendant his silence would be interpreted as evidence he had premeditated a murder].) In the remaining cases, the interrogating officers' remarks clearly conveyed a promise of leniency. (*People v. Hinds* (1984) 154 Cal.App.3d 222, 238 [officers repeatedly suggested that if defendant confessed to murder, his punishment might be less than the death penalty]; *People v. Denney* (1984) 152 Cal.App.3d 530, 544 [officers' presentation of a hypothetical situation to defendant "was an extremely heavyhanded suggestion of leniency"].) As explained above, Detective Radtke made no such remarks. In sum, the trial court properly concluded that appellant's confession was voluntary.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.